(18)

No. 86-341

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

FORT HALIFAX PACKING COMPANY, INC.
Appellant,

VS.

P. DANIEL COYNE, DIRECTOR, BUREAU OF LABOR STANDARDS, MAINE DEPARTMENT OF LABOR, et al.,
Defendants.

On Appeal From the Maine Supreme Court

BRIEF FOR THE EMPLOYMENT LAW CENTER AND THE PLANT CLOSURES PROJECT AS AMICI CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), preempts Section 625-B of Maine's Labor and Industry Code, 26 M.R.S.A. Section 625-B, which requires that certain employers which have terminated or relocated their operations provide specified severance benefits for employees under certain conditions.

2. Whether the National Labor Relations Act, as amended, 29 U.S.C. 141, *et seq.* preempts the above-described enactment.

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INTEREST OF AMICI

This *amicus curiae* brief is submitted by public advocacy and legal rights organizations whose interest is the protection and furtherance of the rights of employees and other individuals who suffer from the effects of plant closures and relocation. The consent of the parties to this filing has been obtained and filed with the Court. A brief description of the nature of the interest of *amici* is annexed hereto at Appendix A.

STATEMENT OF THE CASE

A. Background - The Problem Of Plant Closures

As American industry faces the challenge of competing effectively in a global economy, the pressures on wage earners in this country grow steadily more intense. In order to achieve and maintain a competitive edge, American manufacturers have become more flexible and mobile. Unprofitable manufacturing facilities today are quickly closed down or relocated, often without regard to the consequences for those left behind. Not surprisingly, this increased mobility exacts a terrible toll among U.S. workers and the communities in which they live. Job loss due to plant relocation or shutdown - a relatively rare phenomenon as late as a decade ago - is becoming increasingly common.

Between the years 1979 and 1984, for instance, 11.5 million workers in this country were displaced from employment as a result of plant relocation or closure. *Flaim, Displaced Workers of 1979-83: How Well Have They Fared?*, **Monthly Labor Review**, June 1985 at p. 3. (Cited hereafter as *Flaim, Displaced Workers)* Of these workers, 5.1 million had held the jobs they lost for a period of

three years or more. The median time on these lost jobs was 6.1 years. *Id.* Thus, the jobs lost were, in the main, "steady" occupations on which the wage-earner had come to rely as a source of income over a relatively lengthy period of time.

Moreover, once these jobs were gone they were not easy to replace. As of January 1, 1984 only 60% of these workers had been re-employed.[1] Twenty-five percent of the total were still seeking work, but a devastating 700,000 individuals had withdrawn from the workforce altogether. *U.S. Department of Labor, BLS Reports on Displaced Workers,* **Bureau of Labor Statistics News,** Nov. 30, 1984.

Even those who found work, however, were forced to make significant sacrifices. Almost one half of the total starting to work for another employer did so at a lower rate of pay. In manufacturing industries 40% of displaced workers who found new work did so for 20% or more below what they earned at the job they lost. *Flaim, Displaced Workers, supra,* at p. 11. Moreover, the jobs they found often lacked security. Obviously, as workers start out with a new employer they are more vulnerable to workforce contractions. Studies have shown that there is a far greater tendency for displaced workers to be the victims of further layoffs whether due to further plant closures or for other reasons. *Jarley, Response to Major Layoffs and Plant Closings: A Collection of Readings for Community Mental Health Agencies* (June 1980); *See also, Ferman & Gardner, Economic Deprivation, Social*

1 Those fortunate enough to secure other employment waited an average of six months before their next paycheck. Displaced workers more than 55 yeras old endured a longer wait -- 30 weeks on the average. *Flaim, Displaced Workers, supra,* at p. 4.

Mobility and Mental Health, **Mental Health And The Economy** (Dec. 1979).

The costs of plant closures do not stop at the plant gate. It has been thoroughly documented that for every manufacturing job lost due to plant closure or relocation, other positions dry up as well. Thus, both suppliers and customers of the relocating plant are forced to lay off workers. Also, other local businesses dependent in some part on the income produced in the form of wages must do the same. *Cipparone, Advance Notice of Plant Closings: Toward National Legislation,* 14 U.Mich.J.L.Ref. 283, 287 (1981). The "ripple effect" of a plant closure in a community which has grown up around that plant has been documented in a number of case studies. *See, eg, H.Rep. No. 336, 99th Cong., 1st Sess.* 9 (1985). For each job lost directly to a plant closure at least one more job is lost as an indirect result. In the State of Maine the ratio has been found to be roughly one and one third to one. *Folbre, Plant Closings and Their Regulation in Maine,* 37 Indus. & Lab. Rel. Rev. 185 (1984).

Nor are the costs only measured in lost wages. The social disruption and health consequences experienced by workers permanently displaced from their stable employment are staggering. It is well documented that displaced workers suffer from stress illnesses and stress related conditions at a much higher rate than average. *H.Rep. No. 336, 99th Cong., 1st Sess.* 7 (1985). Even the mortality rate of displaced workers has been found to be far higher than average. One study of the health effects of a plant closure on the laid off workers found the suicide rate to be *thirty times* greater than the average. *Cobb & Kasl, U.S. Dept. of Health, Education and Welfare Pub. No. 77-224, Termination: The Consequences of Job Loss* (1977). An increased suicide rate has been documented following closure of other plants as well. *See,*

H.Rep. No. 336, 99th Cong., 1st Sess. 8 (1985). Another study found the mortality rate among workers laid off from a brewery plant in the midwest to be *sixteen times* greater than the comparable rate for males in the same age distribution. *Id.* at 7. Additionally, the incidence of alcohol and drug abuse as well as family trauma such as child and spousal abuse, desertion and divorce has been documented to increase dramatically following a plant closure where the breadwinner remains unemployed for any length of time. *Id.*

These problems, of course, add to the burden of already overtaxed local social service agencies at the very time at which the communities' resources to meet these increased demands have been sharply cut due to the erosion of the tax base.

The state of Maine has, if anything, come in for more than its share of this scourge. During the decade between 1971 and 1981 a total of 107 plants in this relatively small state were reported closed. These closures resulted in the loss of 21,215 jobs centered mainly in Maine's basic industries. *Leighton, Plant Closings in Maine: Law and Reality,* **Plant Closing Legislation** (ed. A.Aboud, 1984). This figure, devasting by itself, does not take into account the incidence of job loss due to the "ripple effect" in the local communities where these plants closed. Using the multiplier noted above, the number of jobs lost in Maine during the relevant time was 49,219 - more than double the direct loss figure. *Id.* at p. 3. The burden on local public and private social service agencies has been greatly exacerbated by the circumstance that the closings were concentrated in the poorer counties of the state and in the lower wage industries with the harshest impact on women and minority workers. *Id.* at p. 4.

B. Legislative Response to the Plant Closure Problem

In response to this crisis, Maine, like other states and local governments, has seen fit to enact legislation designed primarily to mitigate the impact of a sudden, large scale plant closings on long term employees and their communities.[2]

In 1971 the Maine legislature amended the State's Labor and Industry Code by enacting the predecessor of the statute in dispute herein. As first passed, it provided for the payment of severance pay only when inadequate notice of the closing was given. *Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn S.P.A.,* 320 A.2d 247, 254 (ME. 1974)

In 1980 the severance provision was amended to its present form. It now provides for a minimum benefit

2 Five other states, Wisconsin, Michigan, Massachussetts, Maryland and Connecticut have passed laws having some regulatory effect on plant closures. The relevant provisions of these statutes are summarized briefly at Appendix B of this brief. In addition, at least three other states have enacted legislation authorizing studies of the plant closure problem. These include Nebraska, Rhode Island, and Virginia. *See, Summary of Federal and State Bills on Plant Closing Prepared by the National Center on Occupational Readjustment, Daily Labor Report No. 241* (Bureau of National Affairs, Dec. 14, 1986).

Also, some states have passed provisions the purpose of which is to give assistance to workers and communities attempting to purchase plants in danger of being closed. These include New York, Michigan, California, and Illinois, *Id.*

As is noted by the U.S. Chamber of Commerce in its brief herein, the problem of plant closures has been considered in one form or another in a total of eighteen states. (Brief of the U.S. Chamber of Commerce as *amicus curiae* at p. 26.)

(one week of pay for each year of service) only under the following conditions:

> (1) The employer must employ at least 100 persons. 26 M.R.S.A. Section 625-B(1)(A)
>
> (2) The employer must not otherwise provide severence benefits to employees under any kind of an "express contract." 26 M.R.S.A. Section 625-B(3)(B)
>
> (3) The closure or removal must not have been occasioned by a "physical calamity" which is defined to include an "adjudicated bankruptcy." 26 M.R.S.A. Section 625-B(3)(A)
>
> (4) The employee must have lost his job as a result of a "termination" or "relocation" of the employer's operations. 26 M.R.S.A. Section 625-B(1)(F) and (G)
>
> (5) The employee must have been employed by the employer for at least three years. 26 M.R.S.A. Section 625-B(3)(D)
>
> (6) The employee must not have transferred to a job with his employer at a new location. 26 M.R.S.A. Section 625-B(3)(C)[3]

The Maine Supreme Judicial Court, commenting on the legislative intent evident in this statute stated:

> The obvious intent of the Legislature in passing . . . the statute was to ameliorate the effects on a community when a large employer voluntarily goes out of business. The required payment of

3 For ease of reference the statute shall be referred to as the Maine Plant Closing Benefit Law or the Plant Closing Benefit Law.

> severence pay . . . would necessarily lessen the numbers of persons immediately needing welfare and other assistance from the community or State. It would also enable the affected worker to seek new employment, knowing that in the meantime he would receive at least some compensation after suddenly finding himself without work.

Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn S.P.A., supra, 320 A.2d at 254.

C. The Proceedings Below

On May 23, 1981 Fort Halifax Packing Company (hereafter, "Ft. Halifax") closed its poultry processing and packaging plant in Winslow, Maine, which it had operated since 1972 when it purchased the plant from another food processor, Ralston Purina. Except for a few maintenance and clerical persons, Ft. Halifax laid off all of its more than 100 employees, some of whom had worked continuously at the plant for 20 years or more.

Ft. Halifax did not provide severance pay to any of the affected employees. At the time of the plant closing, many employees were covered by a union contract, but the agreement contained no provision for severance pay. Neither was there any other contract or agreement between Ft. Halifax and any of the affected employees regarding severance pay at the time of the layoffs.

On November 2, 1981 the Director of Maine's Bureau of Labor Standards commenced an action against Ft. Halifax, pursuant to Section 5 of the statute in dispute herein, 26 M.R.S.A. section 625-B(5), which authorizes the Director to bring an action to recover unpaid severance pay. The trial court rejected arguments, *inter alia*, that both ERISA and the NLRA preempted the Maine Plant Closure Benefit Law and on May 2, 1985 found Ft. Halifax liable for severance pay to over 80

employees. Ft. Halifax appealed to the Supreme Judicial Court of Maine, which made minor modifications to the amount of severance pay owed and affirmed the trial court judgment in all other respects on June 2, 1986. Its opinion is reported as *Director of Bureau of Labor Standards, et al. v. Fort Halifax Packing Company* at 510 A.2d 1054 (1986). Ft. Halifax seeks plenary review of the judgment against it in this Court.

SUMMARY OF ARGUMENT

A. ERISA Preemption

The Maine Legislature has grappled with the devastating effects of plant closure or plant shutdown on its citizens, local businesses, and communities by enacting the Plant Closing Benefit Law. Like other state laws which set minimal standards for wages, child labor, occupational health and safety, to name a few, the Plant Closing Benefit Law operates exclusively within an area of traditional state regulation which Congress has reserved to the states in spite of its regulation of pensions and other employee benefits under ERISA. The Plant Closing Benefit Law, which compels the payment of unemployment benefits to certain classes of displaced workers, is exempt from ERISA preemption under Section 4(b)(3), 29 U.S.C. Section 1003 (b)(3), which specifically exempts any employee benefit plan maintained solely for the purpose of complying with applicable unemployment compensation laws. Congress did not intend that ERISA preempt state policy decisions regarding the nature, application, and funding of unemployment compensation programs. This Court's decision in *Metropolitan Life Insurance Company v. Massachusetts*, __ U.S. __, 105 S.Ct. 2380 (1985) clearly states that this exemption from ERISA preemption is intended to be comprehensive in spite of a state law's innovative approach to a particular state concern. Accordingly, states

have been left free to establish their own unemployment programs in a manner which best suits the needs of the state and best addresses the particular nature of the unemployment at hand.

B. NLRA Preemption

The Maine Plant Closing Benefit Law is not preempted by the NLRA because the statute is a valid exercise of police power under which the state uses its broad authority to protect workers within the state. The purpose of the NLRA is to establish equality of bargaining power consonant with a state's substantial interest in preserving the health and welfare of its citizens. Exempt from the purview of the NLRA are those state laws which reflect such deeply rooted local feeling and responsibility that Congress could not have intended to deprive of the state of its power to act. The Maine Plant Closing Benefit Law clearly falls within this local interest exemption. Certainly, Congress did not intend to wipe out the myriad of state and federal worker protection statutes existing at the time the NLRA was enacted.

Nor does the Plant Closing Benefit Law impermissibly interfere in the collective bargaining process simply because severance pay is a mandatory subject of bargaining. On the contrary, the Plant Closing Benefit Law does not address itself to the collective bargaining process. Instead, "the free play of economic forces" will inevitably dictate the amount of severance pay. Consequently, there is no intrusion into federally regulated areas of welfare benefits and collective bargaining. The Maine Plant Closing Benefit Statute must therefore be upheld.

ARGUMENT

I.

SINCE THE MAINE PLANT CLOSING BENEFIT LAW COMPELS THE PAYMENT OF UNEMPLOYMENT BENEFITS, IT IS EXEMPT FROM ERISA PREEMPTION

A. Introduction

Ft. Halifax and supporting *amici* argue that since the Maine Plant Closing Benefit Law provides for "severance" pay, it is brought within the sweep of Section 514(a) of ERISA, 29 U.S.C. section 1144(a), which purports to preempt "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]." (*See*, Brief For Appellant at p. 5) The Employment Law Center and the Plant Closures Project join in and adopt the State of Maine's arguments in opposition to this contention. Specifically, we join in the assertions that: (1) the obligations created by the Maine Plant Closing Benefit Law neither constitute a "plan," as defined by ERISA, nor "relate to" a plan within the meaning of that statute, (*See*, Motion of Appellee P. Daniel Coyne To Dismiss Or Affirm at pp. 7-9), and (2) the application of ERISA to the state law at issue here would have the anomalous result of allowing an employer with no obligations to its employees under ERISA to escape entirely its obligations under state law. *(See,* Motion at pp. 9, 10 and fn. 6, citing *Marcal Paper Mills v. Ewing,* 790 F.2d 195, 198 (1st Cir. 1986)*(Aldrich, J. concurring.))*

Further, we wish to elaborate on the argument made by the Appellee that the Maine Plant Closing Benefit Law is not preempted by ERISA due to the operation of Section 4(b)(3) thereof, 29 U.S.C. Section 1003 (b)(3), which specifically exempts from ERISA coverage any

employee benefit plan maintained solely for the purpose of complying with applicable unemployment compensation laws. *(See*, Motion at p. 12, fn. 8.)

B. Congress Did Not Intend That ERISA Preempt State Policy Decisions Regarding the Nature, Application And Funding of Unemployment Compensation Programs.

The particular unemployment crisis targeted by Maine's Plant Closing Benefit Law is a matter of acute state and local concern. Maine chose to address this concern by exercising its traditional state police powers to provide unemployment benefits.[4] The Plant Closing Benefit Law operates exclusively within an area of traditional state regulation which Congress has expressly reserved to the states under ERISA Section 4(b)(3), 29 U.S.C. Section 1003(b)(3).

This Court has repeatedly cautioned that state regulation is not to be displaced by a federal program unless "Congress has unmistakably so ordained." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Thus, Congressional preemptive intent should not be lightly inferred in the absence of explicit statutory language or clear and unambiguous legislative history. *See, e.g., Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

The broad Section 4(b)(3) exemption contains no limiting conditions or restrictions on the nature of the state's authority to operate free from ERISA preemption in the area of unemployment compensation. There is also noth-

4 Congress has long been sensitive to the importance of the state's interest in developing unemployment benefit programs. *See, New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519, 539 (1979).

ing in the legislative history of ERISA to suggest that the preemption exception for state unemployment compensation laws is more limited than indicated by its express terms. *See, Delta Airlines, Inc. v. Kramarsky*, 650 F.2d 1287, 1305 (2nd Cir. 1981), *aff'd. in part, vac. and rem. in part, Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). It must therefore be presumed that Congress intended to exempt from ERISA coverage employee benefit plans which are compelled by any type of state unemployment compensation law irrespective of the nature of the benefit provided by the law or the method of benefit funding. This construction is indicated because Congress did not intend ERISA to preempt such areas of traditional state regulation. *Metropolitan Life Insurance Company v. Massachusetts, supra*, 105 S. Ct. 2380.

In *Metropolitan Life* this Court considered the exclusion from ERISA preemption for state insurance laws found in Section 4(b)(2) of the statute, 29 U.S.C. Section 1144(b)(2). Like the exclusion for unemployment compensation laws at issue in this case, the State Insurance Law exemption from ERISA preemption contains no modifying limitations, does not purport to distinguish between traditional and innovative approaches to state regulation and is devoid of any suggestion that the exemption is intended to be anything less than total. As in this case, there is no legislative history suggesting that Congress had intended any such limitations in the expressly reserved area of traditional state regulation. Accordingly, the Court concluded that "[t]he presumption is against preemption, and we are not inclined to read limitations into federal statutes in order to enlarge their preemptive scope." *Id.* at p. 2390.

C. The Severance Benefit Required by Maine's Plant Closing Benefit Law Constitutes Unemployment Compensation Within The Meaning of Section 4(b)(3) of ERISA

Severance pay is generally viewed as an unemployment benefit in interpreting ERISA.

> Although severance pay is often a reward for past service, it also serves the same purpose as unemployment benefits. When ties that bind an employee to his or her company are severed by the employer, unemployment for the employee - whether fleeting or permanent, is an inexorable consequence. Thus, in our view severance pay is an unemployment benefit and an unfunded severance pay policy constitutes an "employee welfare benefit plan" under Section 1002(1)(A).

Gilbert v. Burlington Industries, Inc., 765 F.2d 320, 325, (2d Cir. 1985) *aff'd. mem.* __ U.S. __, 106 S.Ct. 3267 (1986). (Although the Second Circuit went on in this case to decide that ERISA preempted the plaintiffs' claims, there was no evidence that the severance pay therein was mandated by a state stautory scheme as is present here. Rather it was allegedly due pursuant to an employer personnel policy. *Id.* at p. 323.) An employer severence benefit plan which is intended at least in part to help employees during periods of unemployment which follow the elimination of their jobs, is considered an unemployment benefit as that term is used in ERISA. *Holland v. Burlington Industries,* 772 F.2d 1140, 1145 (4th Cir. 1985), *aff'd mem. sub. nom., Brooks v. Burlington Industries, Inc.*, __ U.S. __, 106 S.Ct. 3267 (1986). *See also, Jung v. FMC Corp.*, 755 F.2d 708, 710, fn. 2 (9th Cir. 1985); *Petrella v. N.L. Industries,* 529 F.Supp. 1357, 1361 (D.N.J. 1982) ("severance pay, which in general is intended to tide an employee over while seeking a new job, certainly could be considered an unemployment

benefit"); *Sly v. P.R. Mallory and Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983).[5]

D. The Maine Plant Closing Law Is An Unemployment Enactment.

The Maine Plant Closing Benefit Law creates nothing more than a supplemental unemployment benefit, required to be paid to dislocated workers in order to address a particular feature of contemporary unemployment that is of special concern to the state[6]. As will be shown below, the statute clearly fits into the overall structure established by the state of Maine for unemployment relief (*infra* at p. 15-18) and it has been judicially viewed as an unemployment provision. (p. 19, *infra*)

5 Appellant and its supporting *amici concede* that severance benefits compelled by 26 M.R.S.A. Section 625-B are unemployment benefits within the meaning of ERISA. Indeed, this notion is the foundation of their argument that these severance benefits "relate to" an employee benefit plan covered by ERISA and are therefore preempted. (*See, e.g.*, Brief of United States as *amicus curiae* at p. 2).

6 In much the same manner, the New York legislature expanded the type of disability benefits required to be paid by employers to include certain pregnancy benefits when it passed Sections 200-242 of the New York Disability Benefits Law. (N.Y. Work. Comp. Law, Sections 200-242; McKinney 1965 and Supp. 1982-1983) This supplemental assistance, designed to address a special need recognized by the state legislature, was found to be within the broad exception to ERISA preemption for benefits required by a state disability insurance law in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

1. When The Plant Closure Benefit Law Is Read Together With Other Provisions of the Maine Labor and Industry Code It Is Clear That An Unemployment Benefit Was Intended.

Severance benefits mandated by the Plant Closing Benefit Law are an essential component of Maine's overall unemployment compensation scheme. Accordingly, they are classified as "wages" for purposes of determining eligibility for unemployment compensation. *See*, 26 M.R.S.A. Section 1043(19).[7] Eligibility for conventional unemployment compensation arises for any week during which a person is "unemployed," i.e., receiving no wages and performing no services. 26 M.R.S.A. Section 1043(17) and 1191.[8]. Since severance pay received under the Plant Closing Benefit Law constitutes "wages," a person receiving these benefits would not be considered "unemployed" during the period for which benefits were received, and therefore would not be eligible for un-

7 Section 1043 (19) defines "wages" as "all renumeration for personal services, including commissions, bonuses, *severance or terminal pay*, gratuities and the cash value of all renumeration in any medium other than cash." 26 M.R.S.A. Section 1043(19) (emphasis supplied).

8 Receipt of severance pay as "wages" operates in the same manner with respect to eligibility for and calculation of unemployment benefits for partial unemployment. 26 M.R.S.A. Sections 1043(1)(B) and 1191(3). An individual is deemed "partially employed" and ineligible for benefits for any week of partial unemployment in which "wages" received from any source are not more than $5.00 in excess of the total unemployment benefit. This disposes of the Solicitor General's ragument that the Plant Closing Benefit Law does not qualify as an unemployment compensaion law under ERISA Section 4(b)(3) because it does not require recipients to be unemployed (*See*, Brief of the United States as *amicus curiae*, p. 12 n.12)

eligible for unemployment compensation.[9] The statute also expressly disqualifies recipients of such severance pay from any award of unemployment compensation unless and until the severance pay is exhausted prior to securing other employment. 26 M.R.S.A. Section 1193(5)(A) (disqualification as "terminal pay"). This disqualification is consistent with the expressed intent of the sponsor of the 1973 predecessor of the current Plant Closing Benefit Law that severance benefits serve as a substitute for unemployment compensation until exhausted. (*See, 3 Maine Legislative Record,* 4093-94 (1973) (Statement of Rep. Farley)[10]

The Maine plant closing benefit law presumes that workers displaced by a large plant closing or relocation who are unable to transfer to comparable jobs at a new plant will suffer the special problems of "structural unemployment" the law seeks to remedy. Job loss occasioned by the permanent closure of large plants is es-

9 The period of "receipt of wages" for purposes of 26 M.R.S.A. Section 1043(17) presumably would be calculated on the number of weeks for which a displaced worker received plant closing severance benefits.

10 The Solicitor General incorrectly argues that receipt of the plant closing benefit increases the amount of conventional unemployment compensation due displaced workers. Severance compelled by the plant closing law is paid at the same weekly rate as the qualified employees' actual wages and therefore does not increase the rate at which other unemployment compensation benefits are paid. (*See, e.g.*, 26 M.R.S.A. Section 1191(2)) More important, receipt of severance pay under the plant closing law disqualifies the recipient for unemployment compensation during the period in which severance pay is received. The Solicitor General states "if severance pay was [sic] a substitute for unemployment compensation, it would decrease the amount owed." (Brief of the United States as *amicus curiae* at p. 16, fn. 12) Since receipt of plant closing benefits precludes eligibility for unemployment compensation, the Solicitor General presumably would concede these benefits are in fact a substitute for unemployment compensdation.

sentially permanent; comparable replacement work is rarely available. Workers displaced by large plant closings inevitably suffer long periods of unemployment, broken only by sporadic temporary employment in low paying jobs. This job loss is not individually unique, but is endemic to entire industries and regions. Because of the "structural" nature of the unemployment caused by permanent plant closings, efforts by both federal and state governments to remedy the special effects of this problem have to date included programs to retrain "dislocated workers" and to provide supplemental unemployment benefits to support workers during the period of retraining to improve their chances of successful completion of the program. (*See, e.g.*, 26 M.R.S.A. Section 1196)

The Plant Closing Benefit Law targets "structural unemployment" and supports the retraining policy of the State of Maine for workers displaced by plant closings through the provision of supplemental assistance during a period of retraining and readjustment to a new occupation. The calculation of plant closing benefits on the

basis of yers of service is substantially related to the law's remedial objective because workers with longer tenure in a terminated industry and occupation are more likely to require a longer period of retraining and readjustment in order to find replacement work. This statute reflects a state policy decision that dislocated workers who are unlikely to find work in their former industry or occupation are in need of some minimal special assistance to ease the transition to new work.[11]

2. Judicial Interpretation of the Statute By The State of Maine Has Made It Clear That It Is Considered To Be An Unemployment Enactment.

Finally, the Maine Plant Closing Benefit Law has been recognized by the courts of the state as an unemployment enactment. This current statute reflects revisions of earlier Maine plant closing laws, which imposed similar severance benefit obligations on large employers in the case of permanent plant shutdown or relocation. The Maine Supreme Judicial Court has concluded that Maine's plant closing legislation represents a reasonable

11 The Chamber of Commerce argues that because the Maine Plant Closing Benefit Law does not meet the requirements of the Social Security Act, 42 U.S.C. Sections 501-503, for Federal financial assistance, the law must be preempted by ERISA. (Brief of the U.S. chamber of Commerce as *amicus curiae* at p. 13) Neither the Social Security Act nor ERISA require all state unemployment benefit laws to comply with the requirements for such assistance. Some states, like the state of Maine in this case, require employer funding of unemployment benefits wholly independent of and in addition to employer payments to a central insurance fund. *Delta Airlines v. Kramasky, supra*, 650 F.2d at p. 1305.

A state is vested with constitutional power to impose taxes on employers to alleviate unemployment. This independent constitutional authority is in no way limited by the state's contemporaneous participation in voluntary Federal assistance programs. *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 308 (1943).

exercise of the state's police power because the law seeks, through advance notice and severance pay requirements, "to lessen the debilitating impact upon an area of the shutdown of a large business." *Shapiro Bros. Shoe Co. v. Lewiston-Auburn S.P.A.*, 320 A.2d at p. 255 By requiring severance pay on the occasion of a closing or relocation of a large plant, the statute "necessarily lessen[s] the numbers of persons immediately needing welfare and other assistance from the community or state." (320 A.2d at 254) The required severance pay benefits the affected worker in the same manner as the more conventional unemployment compensation benefit available in Maine (26 M.R.S.A. Section 1191) and other states by providing needed interim support for the worker and his or her family. It also lessens the burden on the state's unemployment compensation fund by operating as a substitute unemployment benefit.

E. Benefits Mandated Solely By Maine's Plant Closing Law Present No Possibility Of Interference With The ERISA Regulatory Scheme.

The special unemployment benefit required by the Plant Closing Law is no different than the special disability benefit required by the New York law at issue in *Shaw v. Delta Airlines, Inc., supra*, 463 U.S. 85. Both represent special features of state laws which operate in areas of traditional state regulation, expressly reserved to the states by ERISA's Section 4(b)(3). 29 U.S.C. Section 1003(b)(3). In *Shaw*, the Court interpreted the state law exemption of Section 4(b)(3) as applying only to employee benefit plans maintained solely for compliance with state law. In order to escape ERISA preemption, the plan providing such benefits must operate as a separate administrative unit and provide only those benefits required by the applicable state law. (*Id.* at pp. 107-108)

In this case, severance benefits upon termination due to plant closing or relocation are required only in the complete absence of an employer plan providing for such benefits. 26 MRSA Section 625-B(3)(B) The Maine Plant Closing Law therefore requires a one-time payment of benefits only where an employer has wholly failed to establish and maintain a severance benefit program. Payments are limited to the state-compelled statutory benefits and only occur through an entirely independent administrative action. Thus, the Congressional intent to exempt plans "solely" maintained to comply with state social benefit laws will not be disrupted. *See, Delta Airlines v. Kramarsky, supra,* 650 F.2d at p. 1305.

Maine's "regulation" of severance benefits paid under compulsion of the Plant Closing Law presents no possibility of conflict or interference with federal regulation of severance plans under ERISA. ERISA does not apply until affirmative steps are taken toward severance plan implementation which bind the employer to benefits offered in the plan. *See, Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) When an employer takes such steps, the State of Maine then would withdraw from regulation because an agreement would have been established binding the employer to payment of severance benefits.

The specific purpose of the ERISA preemption provision was to eliminate the threat of conflicting and inconsistent state and local regulation. (Statement of Rep. Dent, 120 *Cong. Rec.* 29197 (1974)) Although ERISA was intended to preempt the field of benefit plan regulation, "[w]e cannot ignore the reality that when Congress enacted ERISA, 'federal exclusivity [was] a corallary of regulatory coverage, not an independent statutory goal.'" *Martori Brothers Distributors v. James-Massengale*, 781 F.2d 1349, 1359 (9th Cir. 1986), *amended* 791 F.2d 799

(9th Cir. 1986), *cert. denied*, No. 86-464 (11/10/86) [citations omitted] In this case, Appellant and *amici* essentially urge preemption as an independent statutory goal requiring blind preemption of special supplemental unemployment benefit programs, even in the absence of interference with the ERISA regulatory scheme or of any evidence of Congressional intent to restrict state authority in this area of traditional state regulation.

Congress has not unmistakably ordained preemption in this case, and in fact has expressly reserved to the states the broad authorityto operate freely in this field of traditional state regulation by way of conventional unemployment insurance programs, as well as innovative supplemental benefit programs to address particular state and local needs. If Appellants are successful in removing this supplemental unemployment benefit law from the broad exemption of ERISA Section 4(b)(3), the ERISA preemption mandate will eclipse the central purposes of the Act itself, and will intrude into areas of traditional state regulation in a manner wholly unintended by Congress.

II.

THE MAINE PLANT CLOSING BENEFIT LAW IS NOT PREEMPTED BY THE NLRA

A. Introduction

In the face of clearly contrary authority and with virtually no factual support, Appellant and the U.S. Chamber of Commerce argue that the Maine statute is preempted by

the NLRA[12] The doctrine of NLRA preemption prohibits state regulation in two areas: (1) those which have been intentionally left by Congress "to be controlled by the free play of ecomonic forces" between employers and unions, *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commissions,* 472 U.S. 132, 140 (1976), *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971), and (2) those which are intended to be the sole domain of the National Labor Relations Board. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959)[13]

As we will demonstrate, however, the provisions of the Maine statute, the manner in which it has been applied in this case and the obvious dictates of the NLRA preemption doctrine make it clear beyond doubt that the statute is a valid exercise of police power pursuant to which states "possess broad authority . . . .to regulate the employment relationship to protect workers within the state." *Metropolitan Life Ins. Co. v. Massachusetts, supra,* 105 S.Ct. at p. 2398. *De Canas v. Bica,* 424 U.S. 351, 356 (1976).

12 The Solicitor General, however, concedes in his *amicus* brief that the NLRA has no such preemptive effect. (*See,* Brief of the United States as *amicus curiae* at pp. 8-10, fn. 6) We respectfully submit that the government was correct in abandoning this position.

13 Although Appellant does not clearly inform the Court which doctrine of NLRA preemption it seeks to assert, the U.S. Chamber of Commerce correctly distinguishes between these two theories, asserting that the Maine statute is preempted on both grounds. (*See*, Brief of the U.S. Chamber of Commerce at pp. 17-26.) The Chamber does not explain, however, the inconsistency inherent in arguing on the one hand that Maine's law interferes in an area specifically intended to be unregulated, ("free play" preemption) and on the other hand that the statute intrudes on an area specifically subject to the administrative control of the NLRB, ("*Garmon*" preemption).

B. The Maine Statute Does Not Costitute Impermissible Interference In the "Free Play of Economic Forces".

The argument of Ft. Halifax and the Chamber of Commerce that establishment of severance benefits for displaced workers by the State of Maine intrudes on the unregulable area which is supposed to exist between employer and union is based on the idea that severance pay is a "mandatory" subject of bargaining (*See,* authorities cited at Brief for Appellant, p. 19). Thus, they reason, parties to a collective bargaining relationship are obliged to negotiate in good faith concerning such an issue until and unless either agreement or impasse is reached. In the event of impasse either side becomes free to use economic self-help to achieve its objectives.

This argument has virtually no basis in the facts of this case. Like hundreds of state laws extending protections to workers, the Maine Plant Closing Benefits Law does not directly address itself to the collective bargaining process. It issues no command that either side make any concession in negotiations with the other. As this Court has observed,

> No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.

Metropolitan Life Ins. Co. v. Massachusetts, supra, 105 S.Ct. at p. 2397. As the Court observed, a myriad of state and federal worker protection statutes were in existence at the time of the passage of the NLRA. There is

simply no evidence that Congress intended to wipe them out of existence when it legislated in the field of collective bargaining rights for employees. *Id.* at p. 2398.

Central to the holding of *Metropolitan Life* is the notion that minimal state labor standards which afford individual workers basic protections through, for example, mandated mental health benefits do not have any but the most indirect effect on the right to self-organization under Section 7 of the Act. 29 U.S.C. Section 157. Thus, they neither encourage nor discourage employees in the exercise of the rights guaranteed them by the statute. *Id.* at 2397. The Maine Plant Closing Benefit Law has a purpose very similar to the Massachusetts law: the protection of the individual workers in the state, both union and non-union, from the direct threat to the general health and welfare posed to them by a sudden plant closing. That plant closures result in economic dislocation which wreaks havoc on individuals and their families and on local businesses and communities has been documented *ante* at pp. 1-4, and noted by the Maine Supreme Judicial Court. *See, Shapiro Bros. Shoe Co., Inc. v. Lewison-Auburn S.P.A., supra*, 320 A.2d at p. 254. It is thus quite plain that the law is not one which seeks to restrain either employers or unions in any aspect of the economic warfare which sometimes takes place between them.

C. This Court's Ruling In *Metropolitan Life* is Dispositive in of Appellant's Arguments Herein.

Appellant points to two criteria of the Massachusetts statute which it asserts are the basis for the holding in *Metropolitan Life* and which distinguish it from the case at bar: (1) that the minimum standards required by the statute neither encourage nor discourage the collective bargaining process, and (2) that the minimum standards affect union and non-union employees alike. Neither of

these features renders *Metropolitan Life* inapplicable here.

Although the Court considered the criteria noted above, they were in no way intended to be talismanic. In fact, the Court more broadly stated that mandated-benefit laws are not "designed to encourage or discourage" collective bargaining interests, but rather are "designed to give specific mimimum protections to individual workers to ensure that each employee covered by the Act would receive" the minimum benefit, regardless of what fruits the bargaining process might bear. *Id.* at 2397; *See also, Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). After thoroughly analyzing the role of the State in affording its citizens minimal standards of protection, the Court concluded that, for the purposes of preemption, "federal labor law . . . is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act. *Id.* at 2398.

Under the provisions of the Maine Plant Closing Benefit Law, employers remain free to fashion any type of severance plan they see fit. The sole constraint imposed by this statute rests on large companies which have failed to provide any type of severance benefit at all in the event of a plant closing. The minimum benefit required by the State in such an instance is designed to ensure that individual dislocated workers and their surrounding communities do not suffer major economic dislocation when a plant closes. The Statute operates without reference to the union or non-union status of the affected employees. Thus, the power of the State of Maine to provide such minimal protections to its individual citizens no more intrudes upon the economic balance of power than did the Massachusetts statute man-

dating minimum health insurance upheld by this Court in *Metropolitan Life, supra.*

Moreover, as the Solicitor General points out, "*any* minimum labor standards law grants employees rights that they do not have to bargain for, but this Court held in *Metropolitan Life* that such laws are not inconsistent with the provisions of the NLRA for that reason." (Brief of the United States as *amicus curiae* at p. 9, emphasis supplied). That employers may agree to less severance pay than is statutorily provided under the Maine law makes the statute *less,* rather than more, intrusive, on the bargaining process. *Id.*

Appellant's assertion that the Maine statute adversely affects union employees because non-union employers can unilaterally establish severance pay benefits which amount to less than is statutorily required is equally without merit. As noted by the Solicitor General, this merely illusrates the obvioius - that non-union employers

have greater freedom to set employment terms than their unionized counterparts. Union employers are still free to establish lower severance pay benefits than those statutorily required within the confines of the collective bargaining process.

Thus, as a legitimate and "unexceptional exercise" of the state's police power *(See, Metropolitan Life, supra,* 105 S.Ct. at 2399), the Maine statute in no way conflicts with the purposes of the NLRA. On these grounds the Maine Plant Closing Benefit Law is not preempted.[14]

III.

THE MAINE PLANT CLOSING BENEFIT LAW SHOULD BE PROTECTED FROM PREEMPTION AS A MATTER OF NATIONAL INDUSTRIAL AND EMPLOYMENT RELATIONS POLICY

The U.S. Chamber of Commerce raises the specter of "mass intrusion into the federally regulated arenas of wel-

14 The attempt by Appellant and the Chamber of Commerce to argue that the Maine Law is preempted under *San Diego Building Trades Council v. Garmon, supra,* is purely speculative and inapposite. The *Garman* doctrine only applies where a state seeks to regulate conduct expressly governed by the NLRA and where the state remedy exactly replicates that which the NLRB could provide. *Belknap Inc. v. Hale,* 463 U.S. 491, 511 (1983). Even then, the *Garmon* preemption rule is limited by the doctrine that a state may regulate "conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law." *Belknap Inc. v. Hale, supra,* 463 U.S. at p. 509. As has been thoroughly argued herein in connection with ERISA, the Maine statute is a clear expression of deeply rooted local concern. Moreover, it barely approaches the "periphery" of any matter encompassed by the NLRA. Even if the strained attempts by Appellant and the Chamber to conjure up the possibility that an unfair labor practice might somehow result from the application of the Maine statute were given some credence, the purely local nature of the state's interest removes the statute from the reach of NLRA preemption. *See, e.g. Linn v. Plant Guard Workers,* 383 U.S. 53 (1966) .

fare benefits and collective bargaining triggered by a signal that state regulation of those areas is permissible." (Brief of U.S. Chamber of Commerce as *amicus curiae* at p. 27)

The Chamber's concern is unwarranted. Employers, particularly multi-state or multi-national employers, are already subject to a large number of state and local provisions which affect the manner in which business is done in a myriad of ways. It has long been recognized that states have the right to enact such provisions to protect their citizenry against the "economic turmoil" (See, Brief of the Chamber of Commerce at p. 28) created by the unfettered discretion of employers to make decisins such as to move from one location to another. To hold that the statute herein is not preempted will do nothing more than validate a narrowly crafted effort to lessen such economic turmoil without intruding into the domain of any regulatory power. Indeed it can only be considered sheer speculation to imagine that a statute as narrowly drawn as the Maine Plant Closing Benefit Law will have any debilitating effect on the admittedly robust "mighty oak of this Court's labor preemption doctrine which sweeps ever outward, though still totally uninformed by any express directive from Congress." *Golden State Transit Corp . v. City of Los Angeles,* __ U.S. __, 106 S.Ct. 1395 (1986) (Rehnquist, J. dissenting.)

It is respectfully submitted that the relatively recent and growing phenomenon of large-scale plant closure and relocation amply warrants protective actions by the states whose citizens bear their brunt. Particularly in the absence of a federal enactment in regard to plant closure, the preemption of state laws would unjustifiably leave large numbers of economically distressed employees with no remedy of any kind. To accomplish such a result in the name of the supremacy of certain federal laws --

ERISA and the NLRA -- which are supposed to be protective of employee rights in entirely unrelated areas would be ironic indeed. The Court is urged to prevent the misuse of the preemption doctrine to reach such an anomolous result.

CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be sustained.

Dated: January 30, 1987 Respectfully sumitted,

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APPENDIX A

Statement of Interest of the The Employment Law Center

The Employment Law Center is the principal project of the Legal Aid Society of San Francisco. The Legal Aid Society ("Society") and the Employment Law Center ("Center") share a long tradition of providing legal representation to the poor. The Society was founded in 1916 to provide counsel to those unable to afford it. Since then it has been firmly committed to representing the underrepresented.

The Center has pioneered in the employment law field for over a decade. It focuses on legal problems which affect disadvantaged people as they seek employment, and it represents those who find employment opportunities denied them for reasons other than their ability to do the job.

One of the major initiatives of the Center over the past five years has been enlarging the rights of unorganized workers, including those laid off as a result of management decisions to move jobs overseas, to discontinue certain types of work, and to shift work away from inner-city locations where jobs are desperately needed. The Center litigated *Carson v. Atari*, No. 530743, Santa Clara Cty. Super. Ct., filed Aug. 15, 1983, a class action lawsuit brought on behalf of over 500 workers who were permanently laid off without even one hour's notice. The lawsuit asserted, among other things, that California Labor Code Section 2922 requires actual, reasonable notice to employees who are laid off. The *Atari* case, as it is generally known around the country, thus sought to establish state law principles entitling workers to notice in the face of layoffs and plant closings. It did not, however, challenge the right of employers to close or

transfer business operations for reasons of business necessity. The case, which has been closely monitored around the country by plant closing activists as well as by the business community, was favorably settled close to trial.

The Center has also gained national prominence for several of its other cases on behalf of workers. Along with the State of California and numerous women's organizations throughout the country, it recently won a major victory in *California Federal Savings and Loan Association v. Guerra*, __ U.S. __, 55 U.S.L.W. 4077 (1986), in which this Court held that state pregnancy disability law was not preempted by the Pregnancy Disability Amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e (k).

The Center also has expertise in other areas pertaining to employee rights. In the area of sex discrimination, the Center has extensively litigated the rights of women to equal employment opportunities. In this regard the Center has appeared in this Court as *amicus curiae* on several occasions, including *Wygant v. Jackson Board of Education*, __ U.S. __, 54 U.S.L.W. 4479 (5/20/86) and *Meritor Savings Bank, FSB v. Vinson*, __ U.S. __, 54 U.S.L.W. 4703 (6/19/86).

In the area of discrimination on the basis of physical handicap, the Center has filed several *amicus* briefs, most recently, *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142 (1985), and *School Board of Nassau County v. Arline*, No. 85-1277, now pending before the Court.

Statement of Interest of the The Plant Closures Project

The Plant Closures Project is a coalition of religious organizations, community groups and labor unions established in 1981 to respond to the economic and social chaos caused by major plant closures. The project is

based in Alameda County, California, a county which suffered 95 plant closures resulting in the loss of 15,519 jobs between February, 1980 and May, 1983. These plant closings resulted into the loss of 38.2 jobs for every 1000 workers in Alameda County. [1]

The Plant Closures Project sponsors special education programs to increase public awareness of the problems of plant closures and economic dislocation and possible solutions to those problems. The Project provides special assistance to local governments and religious, community and labor groups throughout California in responding to specific plant shutdowns. These efforts have included special campaigns to obtain public and private economic development funds to help maintain plant operations under new owners, including employee ownership, as well as funding for retraining and other post-termination support programs for dislocated workers.

The Project also has been deeply involved in the development of state and local legislation designed to ameliorate the social and economic consequences of major plant closings, including a comprehensive plant closing ordinance in Vacaville, California, and advance notice provisions in San Jose, California. The Project continues to work towards enactment of a California plant closing law that would include provisions for advance notice and severance benefits similar to the plant closing law in effect in the State of Maine. A decision by this court invalidating the Maine Plant Closing Benefit Law would have a substantial chilling effect on the so far

1 California Employment Development Department, *Closed Businesses in California: February, 1980 to May, 1983* (Employment Data and Research Division, Labor Market Information Section OIG, June 10, 198

successful efforts the Plant Closures Project has engaged in to obtain both short term relief and long term solutions for workers and communities adversely affected by plant shut-downs.

APPENDIX B

State Plant Closing Laws

A. Michigan

Title: Mich. Comp. Laws Ann., Section 450.751 et. seq. (West Supp. 1979-80).

Type: Notice

Employers Covered: Voluntary

Requirements: Encourages businesses considering closing or relocating to give notice "as early as possible" to employees and their representatives, the Department of labor and the community.

B. Massachussets

Title: Mass. Ann. Laws Ch. 149, Section 182 (Michie/Law. Coop 1984-85).

Type: Notice

Employers Covered: Employers utilizing financing issues, insured or subsidized by a quasi-public agency of the Commonwealth must agree to accept voluntarily standards of corporate behavior.

Requirement: Covered employers are expected to provide affected employees with at least ninety days or the longest possible advance notice of a total or partial plant closing as well as to maintain such employees income and benefits for that period whenever possible.

C. Wisconsin

Title: Wis. Stat. Ann. Section 109.01 *et. seq.* (West Supp. 1984-85) - Mergers, Liquidations, Dispositions, Relocations, or Cessation of Operations Affecting Employees; Advance Notice Required.

Type: Notice

Employers Covered: Businesses or enterprises employing 100 or more persons whose decision to close afffects 10 or more employees.

Requirements: No less than 60 days written, advance notice of and other information about an employer's decision to effect a merger, liquidation, disposition orrelocation must be given to the Department of Labor, affected employees and their representatives, and the local municipality in which the affected facility is located.

Payroll, wages and other remuneration due affected employees must be disclosed to the Department of Labor. The Department may further require the employer to submit a plan setting forth the manner in which it intends to make final payments due its employees.

D. Maryland

Title: Maryland Code, Chap. 147

Type: Quick Response Program; Voluntary Guidelines

Covered Employers: Voluntary

Requirements: Voluntary guidelines establishing (a) the appropriate length of notice, (b) continuation of benefits, and (c) mechanisms through which employers can get assistance in implementing a closing for the purpose of mitigating the impact of a closing on workers, their communities and the employer.

Other provisions: On-site unemployment registration where more than 25 employees are affected; labor market and retraining information, job placement services and job search workshops.

E. Connecticut.

Title: Conn. Gen. Stat. Ann. Sec. 83 - 451 (West Appendix Pamphlet 1984) -

Health Insurance Extension.

Type: Benefit Protection

Covered Employers: Establishments employing 100 or more employees within 12 months prior to a closing or relocation.

Requirements: Covered employers must continue health insurance benefits for 120 days for employees affected by a plant closing or relocation or until the employee becomes eligible for other group coverage. Such employees are also entitled to an additional 39 weeks of coverage through the same provider at their own expense.

This requirement can be superceded by a provision in a collective bargaining agreement concerning the extension of health benefits following a plant closing or relocation.